No. 79-176

In the

Supreme Court of the United States

OCTOBER TERM, 1979

BETTY OSWALD, on her own behalf and behalf of others similarly situated, and PHIL MILLER and EILEEN MILLER, on their behalf and on behalf of others similarly situated and SKOKIE CENTRAL TRADITIONAL CHURCH, *Petitioners,*

vs.

GENERAL MOTORS CORPORATION, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Scheffer Press, Inc.—(312) 263-6850

SUBJECT INDEX

TABLE OF AUTHORITIES

FEDERAL CASES

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

IN RE:

GENERAL MOTORS CORPORATION ENGINE INTERCHANGE LITIGATION,

Petition of Plaintiffs-Objectors Betty Oswald, Eileen Miller, Phil Miller and Skokie Central Traditional Congregation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the decisions of the United States Court of Appeals for the Seventh Circuit rendered in the above-entitled case on February 26, 1979, and July 26, 1979.

CITATIONS TO OPINIONS BELOW

The first decision of the United States Court of Appeals for the Seventh Circuit is reported at 594 F.2d 1106. It set forth in an Appendix filed contemporaneously with this Petition. The second decision is an unreported decision upon petitioners, motion to stay the force of the district court's order subsequent to remand of the first decision. It is included in a Supplemental Appendix to this Petition.

JURISDICTION

The judgment of the Circuit Court of Appeals in the first decision was entered February 26, 1979. A timely petition for rehearing was filed and was denied on May 4, 1979. The second decision was entered on July 26, 1979. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions involved are the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment. Also involved is Rule 23 of the Federal Rules of Civil Procedure 23(e). It reads in pertinent part:

> (e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. . . .

QUESTIONS PRESENTED

1. Will communication of the disapproved settlement offer deprive class members of adequate representation of counsel, violating their constitutional rights to due process under the Fifth Amendment?

2. Does the refusal of the district court to allow petitioners' counsel to communicate with the class members explaining their objections to the disapproved settlement offer violate the constitutional rights of class members and their counsel under the First and Fifth Amendments?

3. Does communication of the disapproved settlement to individual class members violate the provisions of Rule 23(e) of the Federal Rules of Civil Procedure?

STATEMENT

This is a class action brought against defendant General Motors Corporation ("GM") on behalf of purchasers of 1977 Oldsmobile automobiles who received such cars equipped, without their knowledge or consent, with drivetrains, engines, and other component parts produced by other divisions of GM. The trial court certified plaintiffs' class as to the issue of liability only under the Magnuson-Moss Warranty Act, 15 U.S.C.A. Sections 2301-12 (1977 Supp.). The trial court later certified for settlement purposes only a sub-class consisting of only those class members who entered into written purchase orders for the 1977 Oldsmobile on or before April 10, 1977.

On December 19, 1977, GM and several Attorneys General from various (formerly 44 and now 47) states tendered a proposed settlement to the district court, suggesting that it be approved so as to resolve the claims of the sub-class members as to the alleged substitution of drivetrains, engines and other component parts normally placed within Chevrolets and Chevettes. The district court conducted a hearing on objections to the proposed settlement advanced by certain plaintiffs-petitioners here and their counsel. On July 17, 1978, the district court entered findings of fact and conclusions of law regarding the sub-class settlement and an order approving the sub-class settlement. (Jointly set forth in an Appendix to this Petition).

On appeal the Seventh Circuit unanimously reversed the order of the district court approving the sub-class settlement. Notwithstanding reversal of the district court's approval, section VI of the Opinion, "Directions on Remand", authorized the trial court to allow General Motors to communicate the terms of the disapproved settlement offer to the individual members of the sub-class, and left it

to the discretion of the trial court whether successful plaintiffs' counsel would be permitted to convey their opinion as to the adequacy of the offer of settlement in their own communication. (594 F.2d, at 1137-1141).

In due course, plaintiffs filed a petition for rehearing in the Court of Appeals directed at Point VI of the Opinion. Opposing counsel were ordered to respond to the petition, and it was subsequently denied on May 4, 1979. Efforts to stay the mandate in the Court of Appeals and in this Court were denied.

General Motors, on remand, moved the district court to communicate the settlement offer to sub-class members and to approve a form of notice and release. The motion was brought on for hearing on June 14 and July 5, 1979. Copies of transcripts of these proceedings are included in the Supplemental Appendix. Within the hearing on remand the district court surprisingly insisted that transmissions did not belong in the case and that he was "not adjudicating the transmission issue at all." (Supp. App., 6/14/79, Tr., at 8). The court's attention was then directed to the fact that the release the class members were to execute included all components which covers substituted transmissions, and plaintiffs objected to such inclusion if, indeed, the litigation did not concern transmissions (*Id.*, at 9-13). After extensive colloquy and argument, the district court first concluded: "Since I contended in the beginning that I was not trying any transmission issues, I don't think any release should release rights in connection with a transmission claim." (*Id.*, at 14). The court later relented to GM's argument that the notice could adequately explain the difference (*Id.*, at 15) over the strenuous objection of plaintiff's counsel. (*Id.* at 17-24). The notice to the sub-class includes a release form approved by the

district court. If executed by a sub-class member, it releases GM from all claims relating to the substitution of not only any engine, but also any component part or assembly in any 1977 GM automobile.

The trial court also refused to allow attorneys for the objectors to include a letter with the notice informing the sub-class of their evaluation of the offer. (*Id.*, at 36). It was deemed sufficient to include the name, address and telephone number of one of objecting counsel to respond to inquiries of class members. (*Id.*, at 35-36).

On July 23, 1979, plaintiffs filed a Notice of Appeal from the district courts' order of July 5 approving communication of the settlement offer, and also filed a petition for writ of mandamus seeking to vacate the district court's order. The petition for writ of mandamus was filed due to the uncertainty surrounding Court of Appeals jurisdiction to hear this matter on direct appeal. On July 24, the district court denied plaintiffs' motion to stay transmittal of the offer of settlement pending the disposition of the proceedings in Court of Appeals. Plaintiffs then filed a similar motion in the Court of Appeals for the Seventh Circuit.

The Seventh Circuit granted the motion by order of July 26, 1979, but only in the event GM refused to include two sentences in the notice to the class. (Supp. App.) The District Court, on July 27, 1979, granted GM's motion to include the required changes and GM has now transmitted the disapproved settlement to the class.

REASONS FOR GRANTING THE WRIT

This petition involves fundamental constitutional issues affecting all present and future class actions brought in the federal and state courts, and the continued efficiency of Rule 23 of the Federal Rules of Civil Procedure as a means for private citizens to combine their limited resources to achieve a meaningful litigation posture against large corporate defendants. See *State of Hawaii* v. *Standard Oil Company of California*, 405 U.S. 261, 266 (1972).

1. The Due Process Violation

Class counsel were totally fenced out of the negotiations leading to the settlement in this case. They have no idea how the settlement was arrived at and are therefore unable adequately to advise the class as to the settlement offer. Where absent class members are forced to make binding legal decisions, due process demands that their interests be vigorously represented by counsel. When class counsel, the attorneys appointed to represent the class, have been placed in a position where they cannot adequately represent these class interests, due process is violated. The communication of this offer places class counsel in just such a position.

2. The First Amendment Violation

The only persons with *any* information on the value of the transmission claims are counsel for plaintiff-objectors (and of course GM). The district court has refused to allow objectors' counsel to communicate with class members explaining and evaluating the offer of settlement. This aspect of the trial court's order is a prior restraint on class counsels' speech, in violation of the First Amendment. Given the heavy presumption against the constitutional validity of any prior restraint, *New York Times*

Company v. *United States* 403 U.S. 713 (1971), plaintiffs' position on this issue is irrefutable.

3. Rule 23

Petitioners submit that this case presents this Court with the important and unique question of the communication of a settlement offer which has been disapproved. The resolution of this question by this Court is crucial to insure that the protections of Rule 23(e) are not seriously eroded, and to insure that the class action remains a viable instrument of dispensing justice. The Court of Appeals has determined that the settlement offer involved was negotiated in a highly improper manner, and in probable violation of a court order. Class counsel were totally excluded from the negotiations, depriving class members of the vigorous representation of counsel mandated by Rule 23. In spite of the gross irregularities in the negotiations and the inherent prejudice to the class, the Court of Appeals authorized the district court to consider the advisability of permitting GM to communicate the offer to individual class members. Upon remand, the district court has permitted communication of the "offer" to individual class members. Such communication will allow GM to circumvent the provisions of Rule 23(e), and to fragment the class through piecemeal settlements. This result weakens the position of the class, is contrary to the role of the Court as the ultimate protector of the interests of the class, and will destroy the utility of the class action as an effective litigational device.

I.

COMMUNICATION OF THE DISAPPROVED SETTLEMENT OFFER WILL DEPRIVE THE CLASS MEMBERS OF ADEQUATE REPRESENTATION OF COUNSEL, DENYING THEM DUE PROCESS OF LAW.

There is no doubt that due process requirements apply to class actions. *Hansberry* v. *Lee,* 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940); *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). Due process is an extremely difficult term to define, but everyone shares a "feeling" for what it involves. Due process implies "a conformity with natural and inherent principles of justice." *Holden* v. *Hardy,* 169 U.S. 366, 390, 18 S. Ct. 383, 42 L. Ed. 780 (1898). At the most fundamental level, the essence of due process is fair play. *Galvan* v. *Press,* 347 U.S. 522, 530, 74 S. Ct. 737, 98 L. Ed. 911 (1954).

The settlement offer involved in this case is the product of negotiations between GM and several Attorneys General. The Seventh Circuit unanimously and emphatically denounced the settlement as procedurally offensive. *In Re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106 (1979). The Court found that the settlement presented by the Illinois Attorney General was either (1) negotiated without the permission of the other class counsel (in violation of the district court's first pre-trial order), or (2) negotiated by the Attorney General's office in a capacity other than as representative of the class in the federal class action. 594 F.2d 1106, 1126. The Court also found that the trial court's denial of petitioners' requests for discovery into the negotiation process was an abuse of discretion, 594 F.2d 1106, 1131. These unauthorized settlement negotiations and the denial

of discovery have resulted in the total exclusion of petitioners' counsel from the negotiation process.

The Court also decried the abandonment of the prosecution of the claims of post-April 10 class members (594 F.2d, at 1128; criticized the agreed upon compensation of the proponent Attorneys General and private counsel (594 F.2d, at 1129-1131); and finally was "not convinced that the (district) court's conclusion (that the settlement was fair) finds clear support in the record" because 1) the court "apparently misapprehended the nature of the objectors' claims" with respect to the transmission switch, 2) the "failure to apply the ordinary measure of damages for breach of warranty", and 3) the court's refusal to consider the possibility of a recovery of punitive damages. (594 F.2d at 1132, n. 44).

Not only class counsel, but also the district court, the Seventh Circuit and this Court lack the faintest idea how the settlement was rendered. *In re General Motors Engine Interchange Litigation, supra,* 594 F.2d 1106 at n. 36. Class counsel's ability to advise class members about the settlement is foreclosed. Yet GM and the Attorneys General, the very people who fenced class counsel out of the negotiations, force class members to make an important legal decision *now,* at a time when the ability of counsel to give meaningful advice is foreclosed. If such a state of affairs does not violate "inherent principles of justice" and shock the sense of fair play, nothing does.

We submit that it is not enough to state that the notice of offer to settle claims provides an accurate and complete disclosure of the terms of the release, a conclusion, parenthetically, with which we vehemently disagree. Stating what is being released is nothing; stating what *the*

value of what is being released is the only way a class member can make a rational decision. Any rational person would expect that *some* consideration be given *the value* of what is being released as a condition of communicating the offer. This simply has not been done in this case.

A class action has the power to bind class members who have very limited knowledge of the suit. When absent parties may be bound by litigation, the Court must stringently protect the interests of the absent class members. The protection of those absent class members must depend in large measure on the skillful representation of class counsel. In such cases, adequacy of representation takes on a Constitutional dimension as a due process requirement. *Smith* v. *Josten's American Yearbook Co.*, 78 F.R.D. 154, 162 (D. Kan. 1978). Adequacy of representation requires not only a lack of conflicts of interest between representatives and class members, it requires competent legal representation. *Krehl* v. *Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108, 116 (C.D. Cal. 1978). Meaningful representation of counsel as required by due process envisions counsel who will vigorously defend the interests of all class members, counsel who make formal decisions on vital issues, counsel who can accurately advise class members as to the course of the litigation. Class counsel in this case are experienced, able, and dedicated lawyers who have never turned from their fiduciary obligations to the class. But the best efforts to represent the class have been rendered futile now that this offer has been communicated to the class. The total and improper exclusion from the negotiation process hampers counsel from rendering accurate advice regarding the settlement. Refusal to allow class counsel to communicate their

evaluation of the *disapproved* settlement to the class transforms competent representation of counsel into meaningless representation of counsel, and those who accomplished this result will reap the benefits.

At the heart of the due process "fundamental requisite" of notice, hearing and representation is the notion that parties must be able to make informed decisions regarding the legal problems that they face. Where the parties are legally unsophisticated and absent from the action, informed decisions depend totally on the adequacy of the notice, hearing and representation afforded. When *any* of these three links to the party is removed, due process is violated. But the violation is perhaps greatest where the concerned link, the human link of representation, is destroyed. When faced with an often bewildering legal system and a giant corporate defendant, class members look to counsel for support, assurance, and protection. When the best advice class counsel can *possibly* give is hampered by the secret negotiations and class counsel are foreclosed from even giving the knowledge they have notwithstanding the abbreviated discovery and hearing, class members are deprived of any semblance of due process of law.

II.

REFUSING TO ALLOW PETITIONERS' COUNSEL TO COMMUNICATE WITH CLASS MEMBERS EXPLAINING AND EVALUATING THE OFFER OF SETTLEMENT IS A PRIOR RESTRAINT ON COUNSELS' SPEECH, IN VIOLATION OF THE FIRST AMENDMENT.

A prior restraint on speech is a "predetermined judicial prohibition restraining specified expression". *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912. Any prior restraint

bears a heavy presumption against its constitutional validity. *New York Times Company* v. *United States,* 403 U.S. 713, 91 S.Ct. 2140, 29 L. Ed.2d 822 (1971).

The district court has refused to allow petitioners' counsel to send a letter to class members expressing their objections to the settlement offer and their evaluation of the strength of plaintiffs' case balanced against the amount offered in settlement. In the Court of Appeal's opinion it was stated: "Whether the offer to settle should contain a statement by the plaintiff-objectors of their opinion of the adequacy of the settlement package in order to make the communication a full and complete disclosure is a matter left to the trial court's discretion." 594 F.2d, at 1140. Under the present circumstances, however, with the district court's refusal to conduct a hearing and consider the transmission aspect of the case, and its attendant monetary recovery, the Court's comment takes on an entirely different gloss. We submit that the district court's action inhibiting counsel's ability to communicate with their clients and with the public is highly disfavored, and action similar to that taken by the district court has been held to be an unconstitutional prior restraint. *Rodgers* v. *United States Steel Corp.,* 536 F.2d 1001 (3d Cir. 1976) (trial court prohibited class counsel from disclosing document outlining negotiations leading to individual settlement offer). See also, *Rodgers* v. *United States Steel Corp.,* 508 F.2d 152 (3d Cir. 1975); *Chicago Council of Lawyers, supra.* Class counsel have the right and duty to express their opinion of the settlement offer in the manner of their choice. Class members have the First Amendment right to receive that opinion.

> Sometimes a class of poor or powerless citizens challenges, by way of a civil suit, actions taken by our established private or semi-private institutions or governmental entities . . . The lawyer representing the

> class plaintiffs may be the only articulate voice for that side of the case. Therefore, we should be extremely skeptical about any rule that silences that voice. *Chicago Council of Lawyers,* 522 F.2d, at 258.

Class members, as full parties to this litigation, are entitled by the Due Process Clause of the Fifth Amendment to full, vigorous representation of counsel. Class members are entitled to know class counsels' opinion of the settlement offer. The only way to ensure that all class members will receive this opinion is to allow class counsel to contact, by mail, every member of the class. The notice approved by the district court requires class members to take the initiative and contact class counsel in order to obtain the information to which they are entitled as of right. Given the intimidating nature of the legal system, this plan will result in due process only for those sophisticated and aggressive enough to seek out the information. Those most in need of the advice of counsel will most likely never receive that advice. This "second best" solution does not satisfy the requirements of due process, and must not be allowed to stand.

The denial of class members, due process right to adequate representation is closely linked to their First Amendment right to be fully informed about their own law suit. In the area of "commercial speech", this Court has recently emphasized that communications by lawyers and other professionals to their prospective clients cannot be barred because of the client's First Amendment right to be fully informed. *See, e.g., Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976). Here, the facts are even more compelling. Actual clients need to communicate with *their* lawyers. The trial court's ban on class counsel's proposed

letter makes this communication impossible, and clearly violates class members' constitutional rights.

III.

PERMITTING THE COMMUNICATION OF THE DISAPPROVED SETTLEMENT OFFER TO THE MEMBERS OF THE CERTIFIED CLASS CIRCUMVENTS THE PROTECTIONS PROVIDED BY RULE 23(e), SEVERELY PREJUDICING THE MEMBERS OF THE CLASS.

The impropriety of the settlement negotiations, documented in Point I above, cannot be questioned. Yet, the Court of Appeals' decision permits GM to profit from these irregular negotiations and the errors of the district court by communicating the offer to individual class members. Such a result bypasses the protections of Rule 23(e), and presents a serious threat to the class action device.

This case presents a question that has not been ruled upon in any court. No decision authorizing the communication of a disapproved settlement offer to individual class members has been found. Only three cases under Rule 23 have permitted post-certification communication of individual settlement offers. *Rodgers* v. *United States Steel Corp.*, 70 F.R.D. 639 (W.D. Pa. 1976), appeal dismissed, 541 F.2d 1365 (3d Cir. 1970); *Dickerson* v. *U.S. Steel Corp.*, 11 E.P.D. ¶10,848 (E.D. Pa. 1976); *Chrapliwy* v. *Uniroyal, Inc.*, 71 F.R.D. 461 (N.D. Ind. 1976). None of these cases involved a disapproved settlement. In fact, *Rodgers* and *Dickerson* involved the same settlement offer, embodied in a consent decree which was specifically found to be fair and adequate, see 70 F.R.D. 639, 644. In the case at bar, the settlement negotiations have not been found fair and adequate; they have been found unfair and prejudicial to the class.

Communication of a disapproved settlement offer to class members on an individual basis violates the spirit and purpose, if not the letter, of Rule 23(e). Rule 23(e) is designed to protect absent class members from unfair settlements through judicial scrutiny of the settlement offer and investigation into the settlement process. The effect of the rule is thus to protect the class by protecting the integrity of the settlement process. After finding that the integrity of the settlement process has been violated, the Courts should not compound the wrong by allowing the settlement to be communicated to the class.

The absent class members in this case have elected to be represented by class counsel, and have invoked the protection of the Court. They will be bound by the litigation. The class members are full parties to the litigation, not mere "putative" plaintiffs. As this case does not involve pre-certification communication, decisions in support of direct contact with putative class members are not on point. Indeed, the principal authority in support of such communication, *Weight Watchers of Philadelphia* v. *Weight Watchers International,* 455 F.2d 770 (2d Cir. 1972), expressly reserved the issue of communication with actual class members. 455 F.2d at 772, n.1. Communication with actual class members is a very different problem, particularly when a disapproved settlement offer is involved.

As full parties to the action, class members are entitled to vigorous representation of counsel at every stage of the proceeding. Allowing a defendant to make a direct offer of a settlement that was improperly negotiated completely bypasses this vigorous representation. As the Court of Appeals correctly pointed out, negotiations by less than all class counsel weakens the tactical position of the entire class by allowing the defendant to fragment the

class and then attack it at its weakest point. See 594 F.2d at 1125 n. 26. Petitioners have successfully demonstrated their complete and improper exclusion from the settlement negotiations, and the prejudice inherent in such exclusion. The order approving the settlement was reversed, in large part, for this very reason. But rather than allowing petitioners' counsel time for discovery into the negotiations, the Court has allowed GM another opportunity to profit from the improper negotiations. If the ruling is allowed to stand, GM will have made a successful "end run" around Rule 23(e), and petitioners' counsel will have been totally and irremediably excluded from the settlement process. GM should not be permitted to accomplish on an individual basis that which the Court has specifically refused to allow it to accomplish with respect to the entire class.

Permitting the communication of this settlement offer will be an invitation to engage in the very tactics condemned by the Court of Appeals in reversing the approval order. The fact that GM selected the State Attorney Generals to "negotiate the bargain" suggests that if they were not office holders, this communication of an unfairly achieved "settlement" would not cause any court to grant the face-saving measure implicit in its decision.

The Court in *In Re International House of Pancakes Franchise Litigations,* 1972 Trade Cas. ¶73,864 (W.D. Mo. 1972) ruled that "it is impractical, illogical and contrary to the interest of justice to allow the defendant to negotiate piecemeal settlements with individual members of this class under the guise of repurchasing their franchises," (a practice which the defendant contended was normal in its business but which the Court pointed out amounted to settlements since the repurchase agreements included a release of each franchisee's cause of action in

the class action suit). Similarly, "Developments in the Law — Class Actions," 89 Harv. L. Rev. 1318, 1548 n. 66 (1976), states:

> [I]ndividual claim satisfaction following certification and notice . . . generally should not be permitted. Once the court has determined that class action is appropriate and, in b(3) actions, given class members the opportunity to opt out, the defendant should not be allowed to fragment the class through individual settlement offers.

This principle applies with even greater force where the individual settlement offers are based on a settlement which has been disapproved by the Court. Class members ultimately look to the Court to protect their interests, as is evident from the letter from a class member quoted in the opinion of the Court of Appeals, 594 F.2d 1106, 1136:

> Regardless [sic] of the decision of the Court, I will accept it, because I cant [sic] whip a giant like General Motors, but you do have the powers of your Judgeship and your court to set things stright [sic] as they should be.

The Court does not adequately protect the class members when it allows communication of an offer to settle which it has disapproved. To uphold the purposes of Rule 23, the mandate of judicial integrity and due process, the Court should not expose individual class members to this offer which has failed judicial review and denies the class members adequate representation of counsel. After holding that neither the trial court nor petitioners' counsel had an adequate basis for evaluating the fairness of the offer, it is illogical and contradictory to force this evaluation on class members who are even less well informed. GM argued in the lower courts that it is "paternalistic" to withhold the individual settlement offer from the class

members, citing *Rodgers,* 70 F.R.D. at 644. This argument overlooks the fundamental distinction involved; this case involves a disapproved settlement. It is not paternalistic for the Court and counsel to seek to protect class members from making less than a fully informed decision on this important matter. Indeed, this protection is required by due process, as discussed in Point I above. Class members should not be pushed into an uninformed choice, with the resulting possible prejudice to themselves and the entire class, on the basis of "freedom of choice." Freedom of choice does not exist where the foundations of an intelligent, informed choice are absent.

In addition to the prejudice to the class in this case, the overall impact of the Court of Appeals' decision on the class action device must be examined. Allowing a defendant, particularly one as large and powerful as GM, to engage in improper negotiations, and then to use the resulting "offer" to fragment the class through individual settlements poses a serious threat to the maintenance of class actions. This is particularly true where the class action involves an aggregation of many small claims, where class members are less likely to be legally sophisticated, and are more susceptible to pressures to settle. It is precisely this type of case where the class action is most useful. As Mr. Justice Douglas has observed:

> The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.

Eisen v. *Carlisle & Jacquelin,* 417 U.S. 156, 186 (1974) (Justice Douglas, concurring, dissenting in part). The class action is an important social tool whereby justice is dispensed and important substantive policies are realized, such as the substantive policies of the Magnusson-Moss Act which this action seeks to enforce. Individual settlements pose a threat to the realization of these substantive policies by allowing large and powerful defendants to "buy out" and fragment the class.

> Potential representative parties could be so discouraged by the prospect that their litigation will be undermined by a defendant's expeditious satisfaction of claims that some meritorious representative actions might never be brought.

Dole, "The Settlement of Class Actions for Damages," 71 Colum. L. Rev. 971, 997 (1971). The demoralizing effect of this fragmentation is greatly mutiplied when class counsel have successfully attacked a settlement, only to have that very settlement used as the weapon that fragments the class.

Petitioners insist that the $200.00 per car consideration is negligible in terms of what can be recovered by each car purchaser, namely between $6,000.00 and $7,000.00 *plus* attorney fees.* In this regard, petitioners have not

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* This case is an excellent example of how a large and powerful defendant, General Motors, can attempt to "buy out" class members claims at a very cheap price. Contrasted to the $200 "offer" General Motors wants to make to the class, the available remedies provided by the Magnuson-Moss Act Title 15 §2301, et seq., exclusive of punitive damages range between recission of the contract and refund of the cars purchase price to itemized compilation of Loss of the Bargain which exceeds $2,000 *per car*:

dredged that figure from some pie-in-the-sky computation of their imagination. *That is a figure which was actually recovered by a class member in his individual suit in Louisiana which has been affirmed on appeal.* See *Gour* v. *Daray Motor Co., Inc. and General Motors Corp.,* No. 6893 (La. Ct. of App., decided June, 1979). (A copy of this opinion is included in the Supplemental Appendix to this Petition.) And this case concerned *only* engine switch allegations.

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* (Continued)

1. *REFUND*

The Louisiana Court of Appeals, Third Circuit # 6893 has affirmed a judgment and ordered GM to refund the original purchase price of $8,122.65 less $.08 a mile ($1,360.00) or $6,986.65 plus an award of $2,000. attorneys fees. *James F. Gour* v. *Daray Motor Co. Inc. and General Motors Corp.,* # 6893 Court of Appeal, Third Circuit State of Louisiana.

2. *REPLACEMENT/REPAIR*

The consumer can recover the costs necessitated in replacing Chevrolet parts with genuine Oldsmobile parts (simulating what the consumer would have to do if he or she wanted a real Oldsmobile), at a total cost of $3,777.72.

3. *DAMAGES "Loss of the Bargain"*

The consumer is entitled to damages comprised of the following:

(a) the difference in the purchase price of a comparably equipped Oldsmobile vs. a Chevrolet, estimated at	$ 500.00
(b) the difference in relative component value of the engine, and its components, exclusive of the 350/200 transmission estimated at	$ 419.15
(c) the difference in value lost by the consumers as a result of GM's substitution of the 200 transmission for the advertised 350, estimated at	$ 420.50

If GM is allowed to benefit by communication of this disapproved offer to the individual class members, this class action and the protections afforded by Rule 23(e) will be harmed beyond repair. GM will have side-stepped the disapproval of the settlement, and class members will have been denied the vigorous representation of counsel to which they are entitled. This unjust result will have been achieved with the approval of the very Court that should protect the interest of the class members in this litigation.

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* (Continued)

(d) the difference in gas consumption over the life of the car — the Oldsmobile gets 2 miles to the gallon more on the highway and 1 mile per gallon more in the city @65¢ a gal. (add 50% if you are paying 95¢ a gal. for unleaded gas), estimated at	$ 400.00
(e) the Chevy requires a tune-up every 22,500 miles, while the Olds only requires a tune-up every 30,000 miles. Moreover, there is a higher frequency of repairs incurred in the maintenance of a Chevrolet engine. (GM warranty analysis indicated 183% increased cost and 183% increased frequency of repairs). Maintenance of the smaller 200 transmission incurs additional costs, estimated at	$ 275.00
	$2,014.65

The absent class members have not been informed of these remedies in a meaningful way.

CONCLUSION

For the reasons set out above, petitioners respectfully submit that this petition for writ of certiorari should be granted.

Respectfully submitted,

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